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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES E. DAVIS, PETITIONER

VS.

JOHN W. GOODSON, RESPONDENT

Petition for Writ of Certiorari

to the Supreme Court of Arkansas

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QUESTIONS PRESENTED

1.) Whether the right to be free from compulsory self-incrimination and the right to counsel should protect an attorney from punishment for contempt when the attorney in open court advises a client concerning these rights.

2.) Whether the ruling of the Respondent finding Petitioner in contempt of Court denied Petitioner due process of law.

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IN THE

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October Term, 1981

JAMES E. DAVIS, PETITIONER

VS.

JOHN W. GOODSON, RESPONDENT

Petition for Writ of Certiorari

to the Supreme Court of Arkansas

Petitioner, James E. Davis, respectfully prays that a Writ of

Certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas which was rendered in this proceeding on June 21, 1982, and the Order of said Court overruling Petitioner's timely Motion for Rehearing which was entered on July 19, 1982.

OPINION BELOW

The opinion and judgment of the Supreme Court of Arkansas appears in the appendix in this petition. The same is reported at _____ Ark. _____ and 635 S.W. 2d 226.

JURISDICTION

This case arises from a summary punishment for contempt of court. The Petitioner is an attorney and the Respondent is a Circuit Judge of the State of Arkansas. On November 3, 1981, the Respondent found the Petitioner to

be in contempt of court and imposed sentence of twenty-four hours in jail and $250.00 fine. Several hours later the Arkansas Supreme Court ordered Petitioner's release pending appeal. On June 21, 1982, the Supreme Court of Arkansas affirmed the ruling of the Circuit Court. Petitioner filed a timely Motion for Rehearing which the Court denied on July 19, 1982. This Petition for Writ of Certiorari was filed within sixty days of the later date. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3) in that Petitioner asserts deprivation of rights secured to him by the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1.) This case involves the Fifth,

Sixth and Fourteenth Amendments to the United States Constitution.

2.) This case also involves the following provisions of Arkansas law:

Ark. Stat. 34.901 provides:

> "Every Court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others.
>
> First. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
>
> Second. Any breach of peace, noise or disturbance, directly tending to interrupt its proceedings.
>
> Third: Wilful disobedience of any process or order, lawfully issued or made by it.
>
> Fourth, Resistance, wilfully offered, by any person, to the lawful order or process of the Court.
>
> Fifth. The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory."

Ark. Stat. 34-902 provides:

"Punishments for contempt may be by fine or imprisonment in the jail of the county where the Court may be sitting, or both, in the discretion of the Court; but the fines shall in no case exceed the sum of fifty dollars ($50.00), nor the imprisonment ten (10) days. Courts shall always have power to imprison until their adjournment; and when any person shall be committed to prison, for the non-payment of any such fine, he shall be discharged at the expiration of thirty (30) days."

Ark. Stat. 75-1045(a) provides in part:

"Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of subsection (c) of this section, to a chemical test or tests of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor."

Ark. Stat. 75-1045(d) provides in part:

"If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in paragraph (a) of this section, none shall be given. . ."

Arkansas Rules of Criminal Procedure, Rule 18.1(a) provides:

"Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the defendant to:

(i) appear in a line-up or show up;
(ii) speak for identification by witnesses to an offense;
(iii) be fingerprinted;
(iv) pose for photographs not involving reenactment of a scene;
(v) try on articles of clothing;
(vi) permit the taking of specimens of material under his fingernails;
(vii) permit the taking of samples of his blood, hair, and other materials of his body which involve no unreasonable intrusion thereof;
(viii) provide specimens of his handwriting; and
(ix) submit to a reasonable physical or medical inspection of his body."

STATEMENT OF THE CASE

The events which started this litigation occurred on November 3, 1981, in the Circuit Court of Miller County, Arkansas located in Texarkana, Arkansas. The Circuit Court is the court of general jurisdiction. The Respondent is the Circuit Judge. The Petitioner is a licensed attorney.

The Court session on this day served the purpose of arraignment and scheduling for trial in felony cases. Generally, all persons with a pending felony charge were required to attend. Upon a case being called, each Defendant approached the bench with counsel. The Court would arraign the accused if it had not done so previously. Then the Court would either continue the case or schedule the case for trial and for hearing on motions if required.

Among those cases called was State of Arkansas vs. Arlis Ray Brown, number CR-81-73, wherein the Defendant was charged with the offense of failure to appear. When the case was called, the Petitioner, who had previously been appointed by the Court to represent the Defendant, approached the bench and advised the Court that arraignment had already occurred. The Respondent, upon seeing the Defendant, expressed the opinion that the Defendant was drunk and after Defendant denied drinking any intoxicants that day, stated, "Let's take a breatholyzer and see. Go with the sheriff." The Petitioner attempted to object on Fifth Amendment grounds. His objection was interrupted by the Respondent Court stating: "Because he is staggering and coming around here in open Court and I asked him if he had anything to drink and he says he

hadn't." The Petitioner then turned to his client and advised him that he did not have to take the test. The Respondent Court then stated, "Yes, he will take the test, Mr. Davis. Mr. Sheriff, take him down. Now, if you want to get an order to stop me, you go ahead and get one, sir. But when I order one here in front, don't you tell somebody they don't have to do it." Petitioner stated, "He's my client, Your Honor. I can advise him what I see fit, If I'm wrong--"

After the test results showed Arlis Ray Brown to have a reading of .08, the Respondent Court sentenced both Brown and Petitioner for contempt of Court.

In the Courts below Petitioner contended that his conduct was not contemptuous because he was in good faith attempting to advise his client concerning the client's Fifth Amendment

rights. Petitioner also contended that the court's order either misstated or failed to state what the Petitioner had done which allegedly amounted to contempt. Implicit in these arguments is the contention that the Fifth and Sixth Amendment rights of an accused entitle an attorney without fear of reprisal to advise a client that these rights exist and apply in a given context. Apart from the obvious unfairness in being judged by one's accusor, due process requires that the findings of a court imposing penal sanctions must be supported by the evidence. The Supreme Court of Arkansas has itself recognized the proper presentation of constitutional issues by its order staying its mandate pending disposition of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1.) This Court should grant certiorari to determine whether an accused's right to counsel and right to be free from compulsory self-incrimination entitle an attorney to advise the client that such rights apply in a given situation.

The majority opinion of the Arkansas Supreme Court recites the in-court exchange leading to the judgment of contempt. When the Petitioner's client denied having had intoxicants on his appearance day, the court directed him to go with the sheriff and take a breath test. The Petitioner tried to make an objection on Fifth Amendment grounds which the Court interrupted. The Petitioner then advised the client that he did not have to take the test. Before sentence was imposed the Petitioner again tried to

explain his position to the court. Again, the court interrupted and imposed sentence.

The Fifth Amendment right against complusory self-incrimination and the Sixth Amendment right to counsel entitle an attorney to advise the client to refuse to give evidence against himself. If Miranda v Arizona 384 U.S. 436 (1966), Gideon v Wainwright 572 U.S. 335 (1963), and Argersinger v Hamlin 407 U.S. 25 (1972) are to have any meaning for the protection of one charged with crime, then an attorney must have an unfettered right to tell his client to refuse to give evidence against himself. Fortunately for the Petitioner's client, the judge did not order him to confess to any unsolved murder for there would be no difference in doing so and breathing into a breath test machine. In either instance the accused is

ordered to give evidence against himself which could (and did) result in punishment.

The decision of the Court below modifies the Miranda warning as follows: "You have the right to remain silent and the right to consult an attorney but if your attorney tells you that you should remain silent, he will be placed in jail."

The only authority in Arkansas law for the administration of a breath test for intoxication is Ark. Stat. 75-1045 which states that one who drive a motor vehicle gives implied consent to such a test. Even in this context, the law requires that no test be given if the driver refuses. Also, there is no law in Arkansas establishing implied consent to a breath test for those who are compelled to be in court. The only enactment which even may come close is

Arkansas Rules of criminal Procedure, Rule 18.1(a) which does not specifically allow a court to order a breath test for intoxication. Clearly the Petitioner in advising his client that he did not have to take the test, stated to his client a reasonable interpretation of existing law.

That the Petitioner gave advise to the client in open court rather than outside its hearing should make no difference. Given a choice in such a bizarre situation, what attorney would prefer a swearing match with the sheriff about what he said over the record of a court reporter.

One cannot study the opinions of this Court and state appellate courts about the right against compulsory self-incrimination without concluding that the subject is far more complex than an indigent layman can understand.

One cannot dispute that Fifth Amendment rights are often not perceived in a given situation by even those who are schooled in constitutional law much less by those who are not. Why else would this Court require the assistance of counsel to anyone who stands to lose his liberty? Clearly, the right to counsel means the right to counsel who can without sanction tell his client to refuse to give the State the evidence with which the client can be convicted.

The dissenting opinion in the Court below stated the Petitioner's argument in a nutshell: "The issue is whether an attorney can advise a client in good faith as to what he believes the law to be without fear of being thrown in jail." Hopefully, there will never be enough cells to house those lawyers who tell a client that he does not have to give evidence against himself.

If the right to counsel and the right against compulsory self-incrimination are to have any real meaning, this Court cannot allow an inferior court to establish a chilling effect on the exercise of those rights by approving the incarceration of a lawyer who tells his client: "Wait, there may be a Fifth Amendment problem here and you can refuse to cooperate." The opinion in Miranda explains far better than this writer the relationship of the Fourth, Fifth and Sixth Amendments. These rights are meaningless if they cannot be asserted by an accused or by an attorney acting in his behalf.

This case presents the Court the opportunity to reaffirm that in our free society, an attorney will not be punished for representing a client and advising him according to the attorney's

good faith understanding of the law. The Writ of Certiorari should be granted for this reason alone.

2.) This Court should grant certiorari to determine whether Petitioner was denied due process of law by being punished for contempt of court when the evidence supporting such a ruling was insufficient.

Due process requires that when punishment is imposed for any conduct the evidence that such conduct occurred must be sufficient. Jackson v Virginia 443 U.S. 307 (1979), In Re: Winship 397 U.S. 358 (1970), Mullaney v Wilbur 421 U.S. 648 (1975).

Regretably, the only fact findings of the trial court are in abbreviated form written on the docket sheet of the client's case as follows:

> "Def appeared drinking - intoxilyzer test ordered - Atty Davis in open ct. told def not to

take the test....Davis found in contempt - fine 250 and 24 hr in jail -"

It is interesting to compare these "findings" of the Court to Ark. Stat. 34-901 to determine what if anything the Petitioner did that amounted to contempt of Court. It is an intellectual challenge to compare the Court's "findings" with the record (restated in the opinion of the Arkansas Supreme Court) to find where the Petitioner in the words of the Respondent "told Def (sic) not to take the test".

It is respectfully submitted that no rational trier of the facts could find the Petitioner's guilt beyond a reasonable doubt. That guilt of contempt of court must be proven beyond a reasonable doubt has long been established in Arkansas. Dennison v Mobley 257 Ark. 216, 515 S.W. 2d 215

(1974). The "subjective state of near creditude" enunciated in Jackson v Virginia precludes any finding that the Petitioner acted contemptuously.

CONCLUSION

Wherefore, Petitioner prays that this Court issue it Writ of Certiorari to the Supreme Court of Arkansas to review the decision below and that upon plenary consideration that the judgment below be reversed.

Respectfully submitted,

C. Wayne Dowd
1206 State Line Avenue
Texarkana, AR 75502
501-774-5191
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been forwarded to the Attorney General of

Arkansas, counsel for Respondent, in the U.S. Mail, postage pre-paid, this the 16th day of September, 1982.

C. Wayne Dowd

C. Wayne Dowd

APPENDIX

SUPREME COURT OF ARKANSAS

No. 81-229

James E. Davis, Petitioner, Opinion delivered 6/21/82

v.

John W. Goodson, On Writ of

The conduct which gave rise to the trial court's finding of contempt occurred after the client's case had been called. As petitioner and his client approached the bench the judge stated that he believed that the client was drunk. The following exchange then took place:

BY THE COURT:

Let's take a breathalizer and see. Go with the sheriff.

BY MR. DAVIS:

Just a minute. I don't see why he should be made to take one. It's self-incriminatory, and he should be advised that he --

BY THE COURT:

Because he is staggering and coming around here in open court, and I asked him if he's had anything to drink, and he says he hadn't.

BY THE DEFENDANT:

That was because of my boots that --

BY MR. DAVIS:

You don't have to take the test.

BY THE COURT:

Yes, he will take the test, Mr. Davis. Mr. Sheriff, take him down. Now, if you want to get an order to stop me, you go ahead and get one, sir. But when I order one here in front, don't you tell somebody they don't have to do it.

BY MR. DAVIS:

He's my client, Your Honor. I can advise him as I see fit. If I'm wrong--

BY THE COURT:

If I'm wrong, you can take me to the Supreme Court, but don't get here in front of this court and tell somebody not to obey an order that I have just given. You hear me, sir?

BY MR. DAVIS:

I hear you.

Although an attorney has a duty to represent his client zealously, he should not engage in conduct which offends the dignity of the court. An attorney may make a proper objection to a ruling of the court but then should

abide by the ruling so long as it remains in effect. Stewart v State, 221 Ark. 496, 254 S.W. 2d 55 (1953). Here Petitioner was clearly in contempt of court when he specifically advised his client in open court that he could disregard a lawful court order which had just been made.

Petitioner does not question the court's authority to order a breathalizer but alleges that the following statements did not constitute an order: "Let's take a breathalizer and see. Go with the sheriff." It is obvious from Petitioner's immediate response that even he believed it to be an order:

> BY MR. DAVIS:
>
> Just a minute. I don't see why he should be made to take one. It's self-incriminatory, and he should be advised that he--

The statement was clearly taken as an order by the court and all present, and it was, in fact, an order. See Hall v State, 237 Ark. 293, 372 S.W. 2d 603 (1963).

Petitioner also argues that he merely advised his client that he did not have to take the test, which is different from advising his client to disobey the order. We fail to see or appreciate this fine distinction under the facts of this case.

Affirmed.

Purtle, J., dissents.

Dudley, J., not participating.

SUPREME COURT OF ARKANSAS

No. 81-229

JAMES E. DAVIS, PETITIONER, Opinion Delivered June 21, 1982

VS.

JOHN W. GOODSON,

CIRCUIT JUDGE,

RESPONDENT, DISSENTING OPINION

JOHN I. PURTLE, Associate Justice

I disagree with the majority in this case in that I do not believe the applicable statutes were followed and I cannot find contemptuous behavior on the part of the Petitioner.

Ark. Stat. Ann. Sec. 34-904 (Repl. 1962) states:

> Whenever any person shall be committed for a contempt under the provisions of this act (Secs. 34-901 -- 34-906), the substance of his offense shall be set forth in the order, or warrant of commitment.

This procedure was not followed by the court in this case. The court order which was entered on the docket sheet stated:

> Def appeared drinking - intoxilyzer test ordered - Atty Davis in open ct. told def not to take the test....Davis found in contempt - fine 250 and 24 hr in jail -

This brief annotation by the judge cannot be held to set out the substance of the offense of contempt by any stretch of the imagination.

I feel that the wording of the order "Davis in open ct. told def not to take the test" is not the true situation as reflected by the record. I listened to the tape of the proceedings involving the Petitioner and the court, and I could nowhere hear any disrespect in Petitioner's tone or wording to the court. It seems as though the Petitioner never get a chance to finish out his objections before the court would interrupt him. Under the Code of Professional Responsibility an attorney has the right and duty to advise his client as to the law. If an attorney advises a client in good faith even though that advice may be incorrect, he should not be held in criminal contempt

of the court for doing what he feels is proper under the circumstances. The Petitioner states, "You don't have to take the test." This can be interpreted more than one way. Having listened to the tape and the voices and tones thereon, I do not feel that the Petitioner ordered his client not to take the test but was merely advising him that he had the right not to take the test. Whether his client actually did have the right to refuse to take the test is not in issue. The issue is whether an attorney can advise a client in good faith as to what he believes the law to be without fear of being thrown in fail. To uphold a contempt citation in this case would, in my opinion, discourage attorneys from attempting to put forth their best effort in the defense of their clients. In any event, an attorney should be warned by the

court prior to a finding of contempt and should definitely be afforded an opportunity to defend himself as to the charges.

I respectfully dissent.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

James E. Davis ..... *Petitioner*

VS.

John W. Goodson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER AN ATTORNEY WHO, ON GROUNDS OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, ADVISES HIS CLIENT TO REFUSE A COURT ORDER TO TAKE A BREATHALIZER TEST IS IMMUNE FROM CONTEMPT REGARDLESS OF THE MANNER IN WHICH HE CONDUCTS HIMSELF BEFORE THE COURT?

II.

WHETHER THE RULING OF THE RESPONDENT COURT FINDING THE PETITIONER TO BE IN CONTEMPT, AS AFFIRMED BY THE ARKANSAS SUPREME COURT, DENIED THE PETITIONER DUE PROCESS OF LAW?

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No. 82-490

In the Supreme Court of the United States

October Term, 1981

James E. Davis ..... *Petitioner*

VS.

John W. Goodson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 276 Ark. 337, 635 S.W.2d 226 (1982) and is reproduced in the appendix to the Petition for Writ of Certiorari at page 24.

JURISDICTION

The basis for this Court's jurisdiction is adequately set forth at page 5 of the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner has adequately set forth most of the constitutional and statutory provisions involved at pages 6-9 of the Petition. However, respondent submits the following as relevant to the present case:

Ark. Stat. Ann. §34-903 (Repl. 1962)

> Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense.

Rule 42 (a), Federal Rules of Criminal Procedure

> Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT OF THE CASE

The petitioner herein appeared before the Circuit Court of Miller County, Arkansas on November 3, 1981 as counsel for defendant Arlis Brown. As defendant Brown was called to approach the bench it became apparent to the Court that Brown was intoxicated. After questioning Brown with regard to his having consumed alcoholic beverages on that date, the respondent, Honorable John W. Goodson, instructed Brown to go with the sheriff in order to take a "breathalizer" test.

The petitioner inquired as to why Brown should be required to take the ordered test. In response, Judge Goodson explained that he was requiring the test because Brown had appeared in open court, staggering and apparently drunk. Thereafter, the petitioner instructed defendant Brown, in open court, that he did not have to take the test.

Defendant Brown was required to take the ordered test, the results of which indicated that he had in fact been drinking. Subsequently the proceedings were recalled and Brown was found to be in contempt of court. In addition, the court likewise found Brown's counsel, the petitioner herein, to be in contempt for telling Brown in open court that he did not have to obey the court's order. The petitioner was ordered to pay a fine of $250 and to spend 24 hours in jail.

On November 3, 1981 petitioner's counsel appeared before the Arkansas Supreme Court in order to petition for a writ of certiorari. The petitioner was at that time recognized and released from jail.

The merits of petitioner's claim were fully briefed and argued orally before the Arkansas Supreme Court on June 7, 1982. On June 21, 1982 that court issued its opinion affirming the trial court's finding of contempt. *Davis v.*

Goodson, 276 Ark. 337, 635 S.W.2d 226 (1982). Petition for Rehearing was denied on July 19, 1982.

It is from the above-mentioned judgment that the petitioner seeks review by this Court.

REASONS FOR DENYING THE WRIT

It is noted in Rule 17 of the Rules of the Supreme Court that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17 (1) goes on to set out the general considerations governing review of state court decisions as follows:

> . . . (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Initially, respondent notes that the petitioner does not allege that the decision of the Arkansas Supreme Court affirming his contempt citation is in any way inconsistent with the decision of another state court of last resort or a federal court of appeals. Petitioner does rely upon the decision in *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974) in support of the proposition that guilt of contempt of court must be proven beyond a reasonable doubt. However, the Arkansas court noted in its opinion in *Dennison v. Mobley, supra*, that the standard of review in such matters is whether there is any substantial evidence to support the fact finder's verdict. 257 Ark. at pp. 222-223. The standard of review was fully briefed and argued before the Arkansas Supreme Court. Upon considering the record and the briefs submitted by counsel, the Arkansas court concluded . . . "Petitioner was clearly in contempt of court . . . ." 276 Ark. at p. 339.

Petitioner has likewise failed to demonstrate that the instant case falls within the considerations set forth in Rule

17.1 (c)—to wit, involves a federal question which has not been settled by this Court or is in conflict with applicable decisions of this Court. Although petitioner makes an effort to demonstrate that the decision of the Arkansas Supreme Court serves the purpose of modifying this Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), such argument is without merit. The *Miranda* decision addresses the rights of the accused, not those of his counsel.

Although it has not been brought to this Court's attention by the petitioner, respondent has an obligation to discuss the decision of this Court in *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). At first glance it might appear that the *Maness* decision is controlling in the present case inasmuch as it stands for the proposition that an attorney should not be held in contempt for advising his client, in good faith and on Fifth Amendment grounds, to refuse to turn over incriminating materials. However, respondent submits that the *Maness* decision does not mandate either reversal or review of the present case.

Maness v. Meyers, supra, is distinguishable from the present case in two areas: 1) the nature of the order with which the accused refused to comply; and 2) the conduct of counsel.

In *Maness v. Meyer*, counsel advised his client to refrain from abiding by a court-issued subpoena compelling the production of certain written materials (obscene magazines) which would be self-incriminating and would ultimately result in a criminal prosecution. This Court discussed at length the requirement that all orders and judgments of courts must be complied with promptly, even if the order is incorrect, until such time as the order is stayed, appealed, etc. Otherwise, the party risks contempt even if the order is incorrect. 419 U.S. at p. 459. However, this Court went on to discuss the fundamental nature of the Fifth Amendment privilege against self-incrimination and

concluded that counsel could not be held in contempt for advising the client to refuse to turn over incriminating materials. 419 U.S. at pp. 461-466. The nature of the order in the present case—to submit to a "breathalizer" test—is materially different from the order in *Maness v. Meyers, supra.* Minor intrusions into the body, such as to obtain a breath sample, are not violative of the Fifth Amendment privilege against self incrimination. Consider, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

A second distinguishing factor in the present case is the conduct of the attorney. In *Maness v. Meyers, supra*, all parties and the Court were in agreement that there was no evidence of contumacious conduct or any disrespect for the trial court. 419 U.S. at p. 469. Counsel's statements to the court in *Maness, supra*, were made with the respect and professionalism to which the bench is entitled.

In the present case, the exchange took place in open court on a day set aside for arraignment of all persons having felony charges against them. In response to the trial court's order for petitioner's client to go with the sheriff and take a breathalizer test petitioner replied, "Just a minute. I don't see why he should be made to take one." Had the petitioner ceased his remarks at that point, such remarks might have been dismissed as fervent zeal in representing his client. Similarly, had the petitioner offered a formal objection in a manner indicating the appropriate respect for the court, he might have found himself seeking appropriate relief for his client rather than facing a contempt citation. However, subsequent to the respondent court's response to the petitioner's query, the petitioner stated to his client in open court that he did not have to take the test which the court had ordered. The Arkansas Supreme Court acknowledged the petitioner's duty to represent his client zealously, but found that petitioner's conduct offended the dignity of the trial court. 276 Ark. at p. 339. The present case is therefore clearly distinguishable from the facts presented in *Maness v. Meyers, supra.*

With regard to petitioner's due process argument, respondent notes that the issue of sufficiency of evidence was fully briefed and argued before the Arkansas Supreme Court. Upon considering the record of the trial court proceedings in light of such arguments, the Arkansas court concluded that the evidence was in fact sufficient.

Although the right to punish for contempt is inherent in all courts, the Arkansas General Assembly has expressly granted such power to courts of record in the State of Arkansas. Ark. Stat. Ann. §34-901 (Repl. 1962) provides, in part:

> Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others.
>
> > First. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
> > Second. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings.
> > Third. Wilful disobedience of any process or order, lawfully issued or made by it.
> > Fourth. Resistance, wilfully offered, by any person, to the lawful order or process of the court. . . .

Contempts committed in the immediate view and presence of the court may be punished summarily. Ark. Stat. Ann. §34-903 (1962 Repl.). The federal rules are in accord. See Rule 42 (a), Federal Rules of Criminal Procedure.

The primary reason for punishment for criminal contempt is the necessity for maintaining the dignity, integrity and authority of, and respect toward, courts and their decrees. *Dennison v. Mobley, supra*, at p. 221;

Higginbotham v. Williams, Chancellor, 228 Ark. 46, 305 S.W.2d 841 (1957). The deterrent effect on others is just as important as the punishment of an offender. *Dennison v. Mobley, supra*, at p. 221 (other citations omitted).

The actions of the petitioner during the proceedings below were of such a nature as to offend the dignity, integrity and authority of, and respect toward, the respondent court. In flagrant disregard for the respondent court's authority, the petitioner herein interrupted the proceedings and in open court advised his client to defy the court's order. Insolent behavior of this type cannot and must not be tolerated. The dignity and authority of the various courts of this land must be recognized and maintained. The petitioner was properly punished for failure to conduct himself in a manner indicating the proper respect for the respondent court.

CONCLUSION

The petitioner has not demonstrated that the ruling of the trial court or the Arkansas Supreme Court is in conflict with any decision of other state courts, federal courts, or this Court. The petitioner has likewise failed to demonstrate that such ruling involves an important question of federal law which has not been settled by this Court. In view of these reasons and the authorities cited herein, respondent submits that the instant petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis R. Molock, Deputy Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent in Opposition to Petition has been served on petitioner herein by mailing a copy of same, postage prepaid, to C. Wayne Dowd, 1206 State Line Avenue, Texarkana, Arkansas, 75502, Counsel for Petitioner, this 10th day of December, 1982.

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